92-1927

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JESUS ARMANDO FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY MEMBERS THAT THEY MUST UNANIMOUSLY AGREE ON THE THREE OR MORE CONTINUING OFFENSES REQUIRED TO CONVICT ON THE CCE COUNT WAS PLAIN ERROR.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

III. WHETHER THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner JESUS ARMANDO FLORES respectfully prays that a Writ of Certiorari issue to review the unpublished opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 5, 1993, styled *United States of America v. Jesus Armando Flores*. 5th Cir.

OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Jesus Armando Flores* and numbered Cause No. 91-8676, was entered on February 5,

1993. A copy of the opinion is attached hereto as Appendix A.

On March 4, 1993, the court of appeals denied appellant's petition for rehearing. A copy of the order is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 5, 1993. Thereafter, on March 4, 1993, appellant's suggestion for rehearing en banc was denied. This petition is filed within ninety (90) days from the date of the denial of said suggestion. SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

On March 1, 1984, Juan Castillo (Castillo), an officer with the DPS assigned to the narcotics division, and Ronnie Stinnett (Stinnett), an investigator with the DPS, were working in an undercover capacity when they met with Jesus Armando Flores, appellant herein, at the Sound Warehouse in El Paso, Texas. The purpose of the meeting was to negotiate for the purchase from appellant of one ounce of cocaine. Stinnett requested a sample, appellant left, returning several minutes later, and delivered a sample to Stinnett. It was agreed that the agents would purchase one ounce of cocaine, and that delivery of the ounce would occur at the Phoenix Night Club at 9:00 p.m. That evening, appellant delivered one ounce of cocaine to the agents at the night club, and was paid $1800.

In June, 1984, the agents attempted to purchase more cocaine from appellant, but were unable to do so because appellant suspected that he was being followed.

On December 20, 1984, Gerry Villalobos, also an officer with the DPS assigned to the narcotics division, was assisting Stinnett in the Flores investigation with a delivery that was to take place at Bennigans. Appellant met with the agents and had them follow him to a Circle K on North Loop where he told them to wait while he went to go get the cocaine. When appellant returned a few minutes later, he stated that he did not have the cocaine because he could not find his source. The agents met with appellant again later that evening at Bennigans where he

delivered two ounces of cocaine to them and was paid $3400.[1]

Stinnett talked to appellant again on March 4, 1985, to discuss the purchase of 600 pounds of marijuana. They agreed on a price of $400.00 per pound and Stinnett was to take delivery on March 7, 1985. However, on March 6, 1985, appellant told Stinnett that his marijuana source had been busted with cocaine. He told Stinnett that he could provide Stinnett with anywhere from 10 to 16 ounces of cocaine at $1,500.00 per ounce, and Stinnett told him that he was interested in ten ounces.

On March 7, 1985, Stinnett and Villalobos met with appellant at Mervyn's Department Store at 1:00 p.m. Appellant arrived in a brown Ford Ranger pickup, got into the agents' vehicle, and suggested that they purchase larger quantities of cocaine, up to a kilogram. They finally agreed on a pound, purchasing five ounces at a time at $1,500.00 per ounce. About one hour later, appellant returned with one ounce of cocaine and told them that he would deliver 16 ounces at six o'clock that afternoon. The agents agreed, purchased the one ounce, and placed appellant under arrest.

On July 18, 1989, Palmira Lopez (Lopez), a special agent with the DEA, was working in an undercover capacity when she met Antonio Ayala (Ayala) at the Taco

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[1] Appellant also mentioned to the agents that he had ten kilograms of marijuana, but the agents told him that they were not interested.

Cabana on Lee Trevino Street in El Paso, Texas, to negotiate for the purchase of approximately 50 kilograms of cocaine.

On August 7, 1989, at approximately 4:30 p.m., Lopez and Detective Manuel Figueroa (Figueroa), a narcotics officer with the El Paso Police Department, met with Ayala at a Denny's Restaurant in El Paso, Texas, to discuss the cocaine transaction. Ayala told the agents that he had two sources that could provide the cocaine. The first source arrived at the restaurant, spoke to Ayala, and told him he did not want to provide the cocaine. Ayala told the agents that he was going to speak to his second source, appellant, and that he would then contact them on their beeper. When this occurred, they were to meet him at the Vista Hills Car Wash. Ayala left Denny's Restaurant and was followed to Vista Remodeling, located on Zaragosa Road. There, Ayala obtained a picture of the cocaine from appellant. About an hour later, the agents received the beep and proceeded to the car wash to meet Ayala. Ayala provided the agents with a polaroid picture depicting 50 kilograms of cocaine along with a newspaper indicating the date of August 7, 1989, proving that the cocaine was available on that date.

The next day, August 8, 1989, at approximately 12:00 noon, the agents met with Ayala and Jesus Moncada (Moncada) at the Village Inn on Trawood Street in El Paso, Texas. Figueroa was to go with Moncada to see the cocaine, and Ayala was to go with Lopez to see the money. Once Figueroa saw the cocaine, he was to call Lopez, at which time Lopez would hand the money over to Ayala. Figueroa and Moncada drove to a house on Agua Prieta street in the lower valley, went into the

garage, and waited for the cocaine to arrive. A few minutes later, a small "hatchback" being driven by a male arrived. The driver gave Moncada the keys, said, "Here it is", got into a pickup that was already parked there and drove off. Figueroa was then shown 50 kilograms of cocaine.[2] Figueroa called Lopez, the "bust" signal was given, and Ayala and Moncada were arrested.

In August, 1989, Juan Sanchez (Sanchez), a detective with the El Paso Police Department assigned to the Narcotics Division, received information from one of his informants by the name of Mariano Lopez (Lopez) regarding an individual known as Luis Roybal (Roybal). A meeting was arranged for the 31st of August, 1989, at 4:30 p.m. at the Whataburger located at 7400 Gateway East. Present at the meeting were Sanchez, Special Agent George Garcia (Garcia), Lopez, and George Enriquez (Enriquez).[3] Sanchez was negotiating with Enriquez for the purchase of 10 kilograms of cocaine. The original deal was to be for 15 kilograms of cocaine, but Enriquez told Sanchez that "he had lost 50 kilos to the feds and wanted to make sure he wasn't going to lose anymore." Delivery of the 10 kilograms was to take place later on the same day at Enriquez's bar, the Brass Bull, located on North Loop. Sanchez showed Enriquez about $40,000 in the trunk of his vehicle. Later, Enriquez contacted Sanchez and told him that "the stuff was there at his bar." At

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[2] Since the deal was for 49 kilograms of cocaine, Moncada removed one of the kilograms and placed it in the garage.

[3] It was established that Enriquez resided at 940 Agua Prieta in El Paso, Texas, the residence where the seizure of 50 kilograms of cocaine occurred on August 8, 1989.

approximately 9:00 p.m. Sanchez and Garcia arrived at the Brass Bull. Enriquez met the agents outside of the bar and told them that the cocaine was inside of a box in the back seat of a small red car. Sanchez walked over to the small red vehicle, looked in the box in the back seat, and saw that it contained 10 kilograms of cocaine. The bust signal was given and everybody was arrested.

On November 15, 1989, Diane Duke (Duke), a police officer in Ontario, California, contacted an individual by the name of Albert Dodd (Dodd) at the Rodeway Inn. Dodd allowed Duke to search his vehicles that were parked in the lot. Approximately 1.4 million dollars[4] in United States currency were discovered in the trunk of one of the vehicles. It was established that Dodd had placed a phone call to the Flores residence from the motel room.

On May 25, 1990, Luis Martinez[5] and Joseph Peake purchased a 1980 Travelon mobile home from Robert Hooker, a salesman at Easy Living RV Center in El Paso, Texas. The price of the mobile home was $15,750, and was paid for with $9750 in cash and a cashier's check for $6,000. Two other individuals, neither Martinez nor Peake, picked up the Travelon later that day.

Peter Seaverns (Seaverns), testified that he was the manager of Dove Motor Company, a used car dealership in El Paso, Texas, and that he met appellant in 1986 when he sold him a car. He stated that during the time that he

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[4] The actual figure was $1,393,945.

[5] It was established that Martinez was actually Luis Garcia, a codefendant.

knew appellant, he personally sold him ten vehicles, and sold fifteen to twenty vehicles to his associates. Although Seaverns knew that appellant was the owner of Vista Remodeling, in the middle of 1987 he learned that appellant was in the drug business. In July, 1989, Seaverns stated that he purchased cocaine from appellant at Vista Remodeling for $13,000 per kilogram. Seaverns gave Roybal $5,000, representing part of the purchase price for the cocaine, at a Stop-N-Go to give to appellant. In April or May, 1989, Seaverns purchased another kilogram of cocaine from appellant to sell to an individual named Roy Lopez, but the cocaine was returned to appellant because it was yellow. Seaverns made another purchase of one kilogram of cocaine from appellant in April, 1990. This time, Peake was involved in the transaction. Seaverns further testified that in August or September, 1989, appellant called and asked him to meet at the law offices of Mike Villalba. There, appellant asked Seaverns to call another attorney, Gary Hill, to see if Moncada had been arrested for delivery of 50 kilograms of cocaine. About three weeks later, another meeting occurred at Villalba's office where appellant told Seaverns about a bust involving ten kilograms of cocaine and the loss of $800,000 the night before. And, appellant mentioned to Seaverns about the loss of a million dollars in the trunk of a vehicle in California. In March, 1990, appellant purchased two Suburbans from Seaverns paying him $46,000 in cash, stating that he needed to take them into Mexico. The vehicles were not placed in appellants' name.[6] Approximately two

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[6] Title to the vehicles was placed in the name of two younger Mexican males who were with Flores.

weeks later, appellant returned to Dove Motors and purchased another Suburban paying $20,000 in cash. And, in May, 1990, Seaverns stated that Peake came into his office at Dove Motor Company and told him that appellant needed a motor home "to take to the Columbians" for the balloon festival. Since Seaverns didn't have one at the time, he referred Peake to Easy Living RV Center.

In June, 1990, Michael O'Brien (O'Brien) and Lawrence Acevedo (Acevedo), special agents with the DEA, were stationed in Monterrey, Mexico, assigned to the Northern Border Response Team, a team made up of agents working in conjunction with the Mexican Federal Police for the purpose of interdicting aircraft coming from South America, predominantly Colombia. On June 7, 1990, the DEA received information about a suspected flight coming into Monterrey. The agents, along with DEA Agent Martinez, proceeded to the Monterrey Airport and, using two Mexican aircraft, located the target aircraft that was coming into Mexico. They followed the aircraft up to the northern border of Mexico to an area near Villa Ahumada, Chihuahua, named Ajita Progreso, and observed the aircraft approaching a clandestine airstrip. They also noticed that another aircraft was already on the ground refueling and several people walking around, along with a tanker truck, a stake-bed truck, and several Suburbans. The aircraft that they were following landed on the airstrip and joined in with the other aircraft that was already on the ground. The agents landed their aircraft behind the one they had been following, exited, and prevented the other planes from taking off. Shots were fired and all of the people in the airplanes got into the Suburbans and drove off. The agents secured the area

and began to look for other suspects. Twelve hundred (1200) kilograms of cocaine were discovered packaged in yellow plastic with the words "pure gold" written on them. They observed a third aircraft circling the airstrip, and then proceed approximately 50 miles east of their location and then landed on a dirt road. O'Brien and Martinez flew to where this aircraft had landed, searched it, and discovered 600 kilograms of cocaine inside of it. Back at the airstrip, an individual approached and began asking questions about the aircraft. The individual identified himself as "Gino Morales" but was identified in court as Moncada.

On May 7, 1990, court-authorized wire taps were initiated on the phones at appellant's residence and business. These wire taps ran for sixty (60) days. Socorro Grafton Simmons (Simmons), a special agent with the Immigration and Naturalization Service (INS) assigned to the Organized Crime Drug Enforcement Task Force was involved in the monitoring and translation of these telephone conversations pursuant to these court-authorized wire taps.

On June 20, 1990, Robert L. Martinez (Martinez), a special agent with the Internal Revenue Service, Criminal Investigation Division, was involved in the execution of a court-authorized search warrant for documents and evidence relating to narcotics trafficking at the business known as Vista Remodeling located at 11840 Diamond Head, in El Paso, Texas. Appellant had been arrested the previous day and the office sealed off. All of the business records discovered were seized and taken to DEA headquarters. Based on the records seized, Martinez

attempted to reconstruct the expenses for Vista Remodeling for 1990, and came up with a figure of $188,321, representing the business expenses from January through June, 1990. In attempting to reconstruct the business income for Vista Remodeling and Flores Jewelry based upon the records seized, Martinez came up with the figure of $16,385 for Vista Remodeling and $5,000 for Flores Jewelry, or a total income from January through June, 1990, of $21,385. Discovered in one of the trailers located at Vista Remodeling was a business card with the name "Jesse Flores", a telephone number, and address. Two pieces of paper were discovered with the business card and on one, the word "llaves" which means "keys" in Spanish, written on it. Jim Beasley (Beasley), a special agent with the Federal Bureau of Investigation (FBI), assigned to the Racketeering Records Analysis Unit in Washington, D.C., was qualified as an expert in the area of examining and interpreting clandestine business records relating to drug activities. Beasley testified that, in his opinion, documents seized from Vista Remodeling on June 20, 1990, were "related to illicit drugs, specifically cocaine in kilo quantities."

On June 20, 1990, appellant was named in a two-count indictment issued out of the El Paso Division of the United States District court for the Western District of Texas charging him in the first count with conspiring to import a quantity of cocaine, a Schedule II Controlled Substance, into the United States from Mexico, contrary to Title 21, United States Code, Sections 952(a) and 960(a)(1), in violation of Title 21, United States Code,

Section 963; the second count charged him[7] with conspiring to possess with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846.

Thereafter, on September 19, 1990, a nine-count superseding indictment was filed charging appellant with the following offenses: Count I charged that from on or about March, 1984, through and including June 19, 1990, appellant engaged in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848(a) in that he undertook a continuing series of violations of the Controlled Substances Act in concert with five or more persons, and with respect to whom appellant occupied a position of management, and from which series of violations appellant obtained substantial income and resources; Count II charged that from on or about March, 1984, through and including June 19, 1990, appellant conspired[8] to possess with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846; Count III charged that on or about August 8, 1989, appellant possessed with intent to distribute, and did aid and abet others in possessing with intent to distribute, a quantity

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[7] Named as a coconspirator in both counts of the indictment was Joseph Harryraphael Peake.

[8] Names as coconspirators in this count were Joseph Harryraphael Peake, Luis Garcia, Peter Seaverns, Francisco Obregon-Sosa, Jesus Moncada, Antonio Morales Chaves, Luis Ascencion Roybal, and George Virgil Enrequez.

of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2; Count IV charged that on or about August 31, 1989, appellant possessed with intent to distribute, and did aid and abet others in possessing with intent to distribute, a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2; Count V charged that on or about May 8, 1990, appellant used a communication facility to facilitate the commission of a felony in violation of Title 21, United States Code, Section 843(b); Count VI charged that on or about March 22, 1990, appellant and Jesus Moncada conducted a financial transaction affecting interstate and foreign commerce which involved the proceeds of a specified unlawful activity, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, source, ownership and control of the proceeds of said specified unlawful activity, in violation of Title 18, United States Code, Sections 1956(a)(B)(i) and 2; Count VII charged that on or about March 1, 1990, appellant and Francisco Obregon-Sosa conducted a financial transaction affecting interstate and foreign commerce which involved the proceeds of a specified unlawful activity, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, source, ownership and control of the proceeds of said specified unlawful activity, in violation of Title 18, United States Code, Sections 1956(a)(B)(i) and 2; Count VIII charged that on or about March 1, 1990, appellant and Francisco Obregon-Sosa conducted a financial transaction affecting interstate and foreign commerce which involved

the proceeds of a specified unlawful activity, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, source, ownership and control of the proceeds of said specified unlawful activity, in violation of Title 18, United States Code, Sections 1956(a)(B)(i) and 2; and Count IX charged that beginning on or about February 2, 1990, and continuing until June 19, 1990, appellant[9] used an airplane with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying a conspiracy to possess with intent to distribute cocaine, and thereafter performed an attempted to perform acts to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

On June 10, 1991, jury selection and trial began, and on June 18, 1991, appellant was found guilty as to Counts I, III, V, VI, VII, and VIII.[10]

On December 13, 1991, the district court sentenced appellant to a term of life as to Count I; two-hundred forty (240) months as to Count III; forty-eight (48) months as to Count V; two-hundred and forty (240) months as to Count VI; two-hundred and forty (240) months as to Count VII; and two-hundred and forty (240) months as to

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[9] This count alleged that Mark Rasmussen aided, abetted, counseled, induced and procured the commission of this offense in violation of Title 18, United States Code, Section 2.

[10] The jury acquitted appellant as to Count IV, and the district court granted a judgment of acquittal as to Count IX.

Count VIII. The sentences of imprisonment imposed in Counts III, V, VI, VII, and VIII to be served concurrently with that imposed in Count I. In addition, the court imposed a term of supervised release of five (5) years as to Count III; one (1) year as to Count V; three (3) years as to Count VI; three (3) years as to Count VII; and three (3) years as to Count VIII. The terms of supervised release imposed in Counts V, VI, VII, and VIII to be served concurrently with that imposed in Count III. The court also imposed a fine of $250,000.00.

On appeal, appellant argued that the evidence was insufficient to support his conviction for a continuing criminal enterprise as alleged in Count I of the indictment in that there was insufficient evidence of three or more related predicate drug offenses that occurred while the appellant was acting in concert with five or more other people in relation to whom he occupied the position of an organizer or manager.[11] Since the three deliveries of cocaine by appellant in 1984 and 1985 were *neither* related to the subsequent offenses occurring in 1989 *nor* did they occur while appellant was acting in concert with five or more other people in relation to whom the appellant occupied the position of an organizer or manager, they could not constitute the predicated drug offenses establishing a continuing criminal enterprise. Appellant further argued that of the three remaining predicate

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[11] Appellant also raised the issue of the sufficiency of the evidence to support his conviction for money laundering as alleged in counts VI, VII, and VIII of the indictment, and that the trial court erred in setting his base offense level at 46. These issues are not pertinent to this proceedings.

offenses, the conspiracy could not constitute a predicated offense because (1) the evidence was insufficient to establish the conspiracy as alleged in the indictment in which case Appellant's conviction could not stand, and (2) the jury never determined appellant's guilt as to the conspiracy because said count was a lesser included offense of the CCE.

The Fifth Circuit disagreed. The Court held that even if the government had proven two separate and distinct conspiracies rather than the one continuous conspiracy as alleged in the indictment, the variance did not prejudice appellant's "substantial rights" as there was sufficient evidence to prove a conspiracy spanning the years 1987 through 1990. Slip op. at p. 21.

The Court failed to resolve the second issue raised by appellant. The Court held that the issue raised by appellant was "essentially whether the district court was required to instruct the jury members that they must unanimously agree on the three or more continuing offenses required to convict him on the CCE count." Slip op. at p. 21. According to the Court,

> "The jury unquestionably found Flores guilty of the possession with intent to distribute offense and the use of a communication facility to commit a drug felony offense. Most of the same evidence was relevant to, and supported, the conspiracy count. Given the further evidence of the conspiracy that was presented to the jury members at trial, we are convinced that no injustice has been visited upon Flores."

Slip op. at p. 22.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY MEMBERS THAT THEY MUST UNANIMOUSLY AGREE ON THE THREE OR MORE CONTINUING OFFENSES REQUIRED TO CONVICT ON THE CCE COUNT WAS PLAIN ERROR.

This Court has long held that due process mandates "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). The Sixth Amendment and the Federal Rules of Criminal Procedure requires that a jury verdict in a federal criminal trial be unanimous. Fed.R.Crim.Proc. Rule 31(a).[12] "In federal criminal prosecutions, where a unanimous verdict is required, . . . '[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specific offense". *McKoy v. North Carolina*, 494 U.S. 433, ___ n. 5, 110 S.Ct. 1227, 1237 n. 5, 108 L.Ed.2d 369 (1990). *See also*

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[12] In the companion cases of *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) and *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), the Court held that the Sixth Amendment requires a unanimous verdict in a federal criminal trial despite the fact that the Sixth Amendment, which is applicable to the states through the Fourteenth Amendment under *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), does not impose a similar requirement on state criminal proceedings.

United States v. Gipson, 553 F.2d 453, 457-58 (5th Cir. 1977), where the Court stated:

> "The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required."

In *United States v. Echeverri*, 854 F.2d 638 (3rd Cir. 1988), a prosecution for violation of the CCE statute, the Court stated:

> "The usual rule that a general unanimity instruction is sufficient gives way 'where the complexity of the case, or other factors, creates the potential that the jury will be confused.' "

Id., at 643.

Similarly, because of the complexity of the present case, and the potential that the jury would be confused, the district court's failure to instruct the jury members that they must unanimously agree on the three or more continuing offenses required to convict appellant on the CCE charge was "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice" and "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceeding." *See United States v. Beaumont*, 972 F.2d 91, 94 (5th Cir. 1992). What the Ninth Circuit stated in *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983), is equally applicable to the present case:

> "When it appears . . . that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge *must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts.* (Emphasis added).

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Only one other Court of Appeals has addressed the issue of whether district courts should instruct the jury members that they must unanimously agree on the three or more continuing offenses required to convict on the CCE count. In *United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), the Court disagreed with the Third Circuit and held:

> "[O]nce each juror finds beyond a reasonable doubt that a CCE defendant committed at least

> two[13] predicate offenses the purpose of the CCE is satisfied, and the defendant is suited for punishment consistent with the statute. We do not require that the jurors unanimously agree as to the same predicate acts; this we feel will result in unjustified acquittals frustrating the important policy goals of the CCE."

Accord United States v. Kramer, 955 F.2d 479 (7th Cir. 1992).

This case presents the Court with the important question of whether district courts are required to instruct juries in CCE prosecutions that they must unanimously agree on the three or more continuing offenses in order to convict. The Third and Seventh Courts of Appeal have rendered conflicting decisions, and this Court should resolve this conflict.

CONCLUSION

For the foregoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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for Petitioner

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[13] The Seventh Circuit had previously held that only two offenses-excluding a conspiracy or some other inchoate offense-are necessary to constitute a "continuing series". *United States v. Baker*, 905 F.2d 1100 (7th Cir. 1990).

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8676

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS ARMANDO FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-90-CR-258-1(H))

(Filed Feb. 5, 1993)

Before WISDOM, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Jesus Armando Flores was convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a), possessing with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, using a communication facility to facilitate the commission of a felony in violation of 21 U.S.C. § 843(b), and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

money laundering in violation of 18 U.S.C. § 3231.[1] He appeals his conviction for engaging in a continuing criminal enterprise because he contends that there was insufficient evidence to prove the requisite three predicate offenses. Additionally, he appeals his money laundering conviction on the basis that there was insufficient evidence to prove that the currency used to purchase the vehicles was the proceeds of a specified unlawful activity. Finally, he argues that the trial court incorrectly sentenced him by setting his base offense level at 46 based upon an incorrect amount of cocaine attributed to him during the conspiracy. Because we find no error after careful examination of each of these arguments, we conclude that the defendant's conviction and sentence will be affirmed.

I

Appellant Flores was the "key man" in a large scale drug conspiracy involved in the distribution and importation of varying quantities of cocaine. His operation, though relatively small scale in 1984 and 1985, grew larger and larger until his indictment in 1990.

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[1] Also named in the indictment, along with Flores, were Joseph Harryrafael Peake, Luis Garcia, Peter Seaverns, Francisco Obregon-Soa (a.k.a. Arturo Bermudez or El Ingeniero), Jesus Moncada, Luis Ascencion Roybal, George Virgil Enriquez, and Mark Rasmussen.

A

The Early Transactions

During 1984 and 1985 Ronnie Stinnett, a narcotics investigator with the Texas Department of Public Safety, met with Flores on several occasions in El Paso to buy cocaine from him. On March 1, 1984, Stinnett and fellow DPS investigator Castillo met with Flores to negotiate for the purchase of one ounce of cocaine; Flores delivered one ounce of cocaine to the agents and was paid $1800.

In June 1984, Officer Stinnett attempted to buy more cocaine from Flores, but Flores aborted the transaction after suspecting that he was being followed. On December 20, 1984, Officer Stinnett again contacted Flores; Stinnett met with Flores that evening and purchased two ounces of cocaine for $1700 each. Flores offered to sell Stinnett 10 kilograms of marijuana, but Stinnett declined to make such a purchase.

On March 4, 1985, Officer Stinnett talked to Flores about purchasing 600 pounds of marijuana. They agreed on a price of $400 per pound with Stinnett taking delivery on March 7. On March 6, Flores told Stinnett that his marijuana source had been arrested, but that he could provide Stinnett with ten to sixteen ounces of cocaine at $1500 per ounce; Stinnett agreed to buy ten ounces. Flores met with Stinnett and another agent on March 7 and urged them to purchase a full kilogram of cocaine. The agents eventually agreed to purchase sixteen ounces. Flores left the parking lot where the transaction took place and returned about an hour later with an ounce of

cocaine and a promise to deliver the rest later that evening. The agents purchased the ounce from Flores and immediately placed him under arrest.

B

Dealings with Peter Seaverns

Beginning in late 1988, Flores supplied cocaine to Peter Seaverns, the manager of Dove Motor Company, a used care dealership in El Paso. In April or May 1989, Seaverns bought a kilogram of cocaine from Flores. In July 1989, Seaverns bought another kilogram of cocaine from Flores for $13,000. Seaverns went to Flores's business, Vista Remodeling; Albert Dodd took the keys to Seaverne's car and returned a few moments later, leaving the kilogram of cocaine on the car's seat. Seaverns paid for the cocaine in installments, making a $5000 payment to Luis Roybal at a gas station at Flores's instruction. Seaverns knew Roybal by the name "Joe" and had met him in Flores's company on several prior occasions.

In April 1990, Seaverns again purchased cocaine from Flores. Seaverns went to Flores's residence and said he needed a kilogram of cocaine. Flores gave Seaverns's car keys to Joseph Peake, who drove away and returned about 45 minutes later, leaving the cocaine on the front seat of the car.

C

50 Kilograms of Cocaine

On July 18, 1989, Palmira Lopez, a special agent with the DEA, met with Antonio Ayala and Chris Taylor at an

El Paso restaurant to negotiate for the purchase of cocaine. Agent Lopez initially discussed purchasing ten kilograms of cocaine; reluctant to sell ten kilograms at once, Ayala gave Lopez a sample and later sold her one kilogram of cocaine. Thereafter, Ayala stated that he could provide up to 50 kilgrams to Lopez. Ayala then contacted Flores; he told Flores that he had a party interested in buying about 50 kilograms of cocaine. A few days later, at Dove Motor Company, Flores told Ayala that he could provide the cocaine for the deal at a price of $13,000 per kilogram.

On August 7, 1989, Agent Lopez and Detective Manuel Figueroa of the El Paso police department met with Ayala at a restaurant in El Paso to discuss the purchase of 50 kilgrams of cocaine. Ayala told the agents that he was going to speak to this "source" and that he would meet with them later. From the restaurant, Ayala called Flores. Ayala then left the restaurant and was followed to Vista Remodeling. There Ayala met with Flores, Jesus Moncada (Flores's brother-in-law), and another man who was to deliver the cocaine.

The next morning, August 8, Ayala went to Moncada's apartment per Flores's instructions. Ayala received a key to the house where the cocaine would be delivered, which was owned by George Enriquez. Ayala then called Agent Lopez and the two agreed to meet at a restaurant shortly thereafter to complete the transaction. When the group met at the restaurant, Figueroa went with Moncada to see the cocaine, and Ayala accompanied Lopez to see the money. Once Figueroa saw the cocaine, he was to call Lopez, and then she was to give the more than $600,000 in payment for the drugs to Ayala.

Figueroa and Moncada drove to the house, went into the garage, and waited for the cocaine to arrive. A few minutes later, a male drove up in a small automobile, gave the keys to Moncada and said "here it is," got into a pickup truck already parked at the house, and drove away. Figueroa was then shown 50 kilograms of cocaine in the back of the car. Figueroa called Lopez, the "bust" signal was given, and Ayala and Moncada were arrested. In addition to the cocaine, agents seized an address book from Moncada containing Flores's name and telephone number as well as the name and numbers of Luis Roybal.

Later that day, Flores called Seaverns and asked to meet him at the office of attorney Mike Villalba in El Paso. In Villalba's office, Flores explained that Moncada was supposed to deliver 50 kilograms of cocaine to a buyer around noon that day, but that Flores had not yet heard from him. Flores asked Seaverns to call another El Paso lawyer, Gary Hill, and find out whether Moncada had been arrested. Seaverns was unable to reach Hill.

D

The Villa Ahumada Incident

Between March and June 1990, Flores readied his organization for the importation of at least 1200 kilograms of cocaine by plane into northern Mexico. Preparations began in early March 1990, when Flores bought two four-wheel-drive Suburbans from Seaverns at Dove Motor Company. Flores told Seaverns the vehicles were headed for Mexico. When Flores purchased the vehicles, he was accompanied by Francisco Obregon-Sosa, Ismael Navarrete, Juan Carlos Lozoya, and two other young

Hispanic males. Flores paid $21,300 in cash for a 1989 model and $24,700 cash for a 1990 model. Although Flores was the purchaser, he instructed Seaverns to place title to the vehicles in the names of the two young men, one of whom gave identification bearing two different names. Although Seaverns was required by I.R.C. § 6050-I to file an I.R.S. Form 8300 evidencing a cash transaction exceeding $10,000, he did not. About two weeks later, Seaverns sold a third Suburban to Flores for $20,000 in cash. Flores negotiated the purchase and picked up the vehicle the next day; Jesus Moncada delivered the cash payment. Because Flores requested that the vehicle not be placed in his name, Seaverns agreed to leave the title open without moving the vehicle through Dove Motor's inventory. Some time later, Ismael Navarrete picked up the title, which was put in the name of Roberto Luis Corral.

Obregon-Sosa and several others took the Suburbans to Industrial Communications in El Paso, where they purchased two-way ham radio communication equipment capable of long distance, car-to-car, and ground-to-air communications. Mobile radio units were installed in two of the three Suburbans, from which the rear seats had been removed. A third mobile unit and a base unit were delivered without installation.

During May, agents intercepted several telephone conversations during which Flores and others discussed locating a suitable landing strip.[2] On May 8, Flores called

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[2] During May and June 1990, pursuant to court order, agents monitored incoming and outgoing telephone calls on

and spoke with a man in Mexico about the location of several airstrips. Flores said that a strip some five hours away was too far, even though it was well paved. The man knew of a strip much closer, but not as well paved. The two men agreed to view the strips together soon. On May 23, Francisco Obregon-Sosa called Flores; Obregon-Sosa mentioned a meeting to be held about 35 minutes later to introduce Flores to "the pilot" and another person.

Also in May, Joseph Peake and Luis Garcia obtained a motor home on Flores's instructions. Peake, who had previously distributed cocaine and picked up vehicles for Flores, first went to Seaverns at Dove Motors. Seaverns referred Peake to the Easy Living RV Center. On May 25, 1990, Peake and Garcia, who used the name "Luis Martinez," bought a 1980 Dodge Travelon motor home from the Easy Living RV Center. Garcia worked for Peake and Flores, and had previously served as nominee owner for a motorcycle and a car purchased by Flores. Garcia and Peake initially attempted to pay the $15,675 purchase price in cash. Because Easy Living would not accept a cash payment exceeding $10,000, they made two separate payments, first tendering $9750 in cash, then delivering a cashier's check for $6000 about an hour later. Later that afternoon, two other men picked up the motor home from Easy Living. Title was placed in the name of "Luis Martinez."

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several telephones used by Flores at Vista Remodeling and his residence, in addition to those placed to or from a cellular phone subscribed to by Luis Garcia.

These preparations led up to the events of June 7, 1990, when DEA agents seized 1200 kilograms of cocaine from several aircraft [sic] in northern Mexico. In the early morning hours of June 7, the agents and Mexican police officers flew over a clandestine airstrip near Villa Ahumada, Chihuahua. They observed one airplane in the process of refueling, a tanker truck, and several Suburbans. A second plane soon landed at the strip. The agents then landed their plane on the airstrip, exited the plane, and prevented the other aircraft from taking off. Shots were fired and the suspects jumped into the Suburbans and drove off. At the site the agents found about 1200 kilgrams of cocaine wrapped in yellow plastic. Agents retrieved various maps and documents from the planes showing that the flights had originated in Columbia. Near the strip, the agents found one of the three Suburbans Seaverns had sold to Flores in March. Jesus Moncada was arrested at the airstrip after he approached the agents and began asking questions about the aircraft; he claimed to be "Gino Morales."

Soon after the agents had secured the airstrip, a third plane circled the strip and then proceeded about 50 miles east before landing on a dirt road. Two of the agents flew to the area where this plane had landed, searched it, and discovered 600 kilograms of cocaine inside.

A number of incidents followed the Villa Ahumada seizure that further implicated Flores in the affair. Peake left the Dodge motor home with Seaverns to sell, giving Seaverns the keys and title and telling him to get in touch with someone at a Ford dealership to obtain possession of the vehicle. Agents seized the motor home from Dove Motors in June 1990. Agents also intercepted several

phone conversations pertaining to the Villa Ahumada affair. On June 12, Flores spoke with an unidentified male, who said "they've got my Guero over there . . . my son." Other callers also asked if "Guero" had been detained in Mexico. Several additional phone calls referred to the seizure and the detention of those involved in the offense in Mexico. On June 9, Flores arranged and paid for three charter flights to transport 10 to 12 passengers from El Paso to Miami. Joseph Peake accompanied the passengers on the first flight. He asked the pilot if the plane could fly as far as Bogota, Colombia; it could not. The pilot returned to El Paso and flew a second group of people to Florida on June 10, followed by a third group on June 12.

E

Additional Evidence

Additional evidence showed that during 1990, Flores paid for several chartered flights on Rasmark Jet Service, flying to Cancun, Detroit, San Diego, Florida, and other locales.[3] Flores's account with Rasmark was kept in the name of Vista Remodeling; when government agents sought Flores's account records in August 1990, Rasmark was unable to provide them because all the invoices had "inexplicably" been removed from the file. Rasmark had to reconstruct its records for those flights that employees could remember. Flores also sought to purchase four Lear

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[3] Rasmark Jet Service was owned and operated by co-indictee Mark Rasmussen.

Jet airplanes in early 1990; he was arrested before he could complete the purchase.

Flores's business, Vista Remodeling, proved to be little more than a front for his drug trafficking activities. In a search of the premises, agents saw scrap sheetrock and lumber, a pool table, and several old vehicles, but no inventory of building materials or other evidence that the business was currently operating. Analysis of the business records seized for both Vista Remodeling and Flores Jewelry (another business Flores owned and operated) for the first six months of 1990 showed that Vista had expenses totalling $188,321, while income was only $16,385. Records of Flores Jewelry showed additional income of only $5,000. Flores's bank accounts for that period, however, showed deposits exceeding $240,000.

A portfolio seized from the premises contained Flores's business card and several handwritten pages documenting narcotics transactions involving substantial quantities of cocaine. The records reflected transactions involving "Ingeniero" (Obregon-Sosa) in amounts totalling $550,000, a 50 kilogram transaction in "L.A.," and additional cocaine transactions totalling $1,532,200.

F

Trial Court Proceedings

After indictment, the case proceeded to trial. A jury convicted Flores of conducting a criminal enterprise between March 1984 and June 1990 in violation of 21 U.S.C. § 848, possessing with intent to distribute cocaine on August 8, 1989, in violation of 21 U.S.C. § 841(a)(1) (resulting from the 50 kilogram of cocaine sold to Agent

Lopez), using a telephone to facilitate the commission of a drug felony in violation of 21 U.S.C. § 843(b) (resulting from the conversations concerning the location of an airstrip), and conducting three financial transactions in March 1990 with the proceeds of unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(B) (i.e., money laundering, resulting from the purchase of the three Suburbans from Seaverns). Flores timely filed this appeal.

Flores challenges his continuing criminal enterprise and money laundering convictions on the grounds that the evidence adduced was insufficient to sustain the guilty verdicts. In his appeal of his sentence, Flores challenges fact findings made by the district court concerning the quantity of cocaine attributed to him for sentencing purposes. The government argues that sufficient evidence proves that Flores committed three or more felony drug offenses as part of a continuing series of violations, each of which satisfied the requirements for a predicate offense as set out by the CCE statute. Conversely, the government further argues that sufficient evidence proved that the money used by Flores to purchase three Suburbans was the proceeds of unlawful activity, and that the district court's decision to include 1200 kilograms of cocaine seized in Villa Ahumada and 256 kilograms of cocaine referenced on ledgers seized from Flores's business when calculating the relevant drug quantity for sentencing purposes was not clearly erroneous.

II

In reviewing a claim of insufficiency of the evidence, this court must view the evidence in the light most

favorable to the government, making all reasonable inferences and accepting all credibility choices in favor of the jury's verdict. *United States v. Nixon*, 816 F.2d 1022, 1029 (5th Cir. 1987), (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942)). We must affirm the verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Nixon*, 816 F.2d at 1029 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979)).

Fact findings made by the district court for sentencing purposes are reviewed for clear error. 18 U.S.C. § 3742(d); *United States v. Pierce*, 893 F.2d 669, 678 (5th Cir. 1990).

III

A

Flores presents a series of related arguments in his challenge to his conviction for engaging in a continuing criminal enterprise (CCE). First, he argues that to prove the offense of continuing criminal enterprise, the government was required to establish three or more related predicate drug offenses that occurred while he was acting in concert with five or more other people in relation to whom he occupied the position of an organizer or manager. He asserts that the three deliveries of cocaine in 1984 and 1985 were not related to the subsequent offenses occurring in 1988 through 1990, nor did they occur while he was acting in concert with five or more other people in relation to whom he occupied the position of organizer or manager. Therefore, he argues, these early transactions

cannot constitute the predicate drug offenses establishing a continuing criminal enterprise.

He then asserts that of the three "remaining" predicate offenses,[4] the conspiracy count cannot constitute a predicate offense because: (1) the evidence was insufficient to establish the single conspiracy encompassing all the offenses from March 1984 until June 1990 as alleged in the indictment because the early transactions were not part of the same conspiracy as the later ones; (2) the evidence was insufficient to establish that at all times during the conspiracy five other people were involved in the illegal activity; and because (3) the jury never determined his guilt as to the conspiracy because this count was a lesser included count of the CCE offense.[5]

The government offense argues that sufficient evidence proved that the early cocaine sales were part of a single conspiracy spanning six years. Thus, it asserts, because the three early transactions were related and

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[4] These offenses consist of a conspiracy charge on which the jury did not return a verdict because the district court directed it to consider the count only if it found Flores not guilty of the CCE offense; a charge of possessing cocaine with the intent to distribute on August 8, 1989 (the 50 kilograms sold to Agent Lopez); and a charge of using a communication facility to facilitate the commission of a drug felony (the telephone conversations concerning the location of an airstrip). Flores does not contest the fact that the latter two offenses can serve as CCE predicate offenses.

[5] As stated in Footnote 4, the jury returned no verdict on the conspiracy charge because the district court directed it to consider that count of the indictment only if it found Flores not guilty of the CCE offense.

because they were part of the same conspiracy encompassing later events, the evidence proves that Flores committed three or more felony drug offenses as part of a continuing series of violations; thus, evidence of these early offenses and the encompassing conspiracy is sufficient to sustain his CCE conviction.

We hold that there was a sufficient evidence to sustain Flores's conviction for conducting a continuing criminal enterprise. It is irrelevant for our purposes whether the government proved the existence of a single conspiracy spanning six years or instead proved two separate conspiracies. It is undisputed that the government established that a conspiracy existed from 1987 to 1990 that satisfied the criteria for a CCE predicate offense. We further hold that because the evidence fully supports this conspiracy, it may be used as a predicate offense to uphold the conviction under the continuing criminal enterprise statute even through it was not specifically ruled on by the jury. Thus the evidence showed that Flores committed three or more felony drug offenses as part of a continuing series of violations, and was therefore sufficient to sustain his conviction for conducting a continuing criminal enterprise.

A CCE offense under 21 U.S.C. § 848 has five elements: (1) a predicate offense violating a specified drug law (2) as part of a "continuing series" of drug violations (3) undertaken while the defendant was acting in concert with five or more other people (4) in relation to whom the defendant occupied the position of organizer or manager and (5) from which the defendant obtained substantial income or resources. *United States v. Hicks*, 945 F.2d 107, 109 n.1 (5th Cir. 1991) (citing *Garrett v. United States*, 471

U.S. 773, 786, 105 S.Ct. 2407, 2415 (1985)). Three or more related predicate drug offenses are necessary to establish the "continuing series" of violations required under the CCE statute. *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978). A drug conspiracy may serve as a predicate offense to a CCE conviction. *Hicks*, 945 F.2d at 109. Thus, proof of a conspiracy together with proof of two other drug offenses is sufficient to establish a CCE.

It is not required that the defendant acted with all five persons at the same time. *United States v. Michel*, 588 F.2d 986, 1000 n.14 (5th Cir. 1979); *United States v. Bolts*, 558 F.2d 316, 320 (5th Cir. 1977). Nor is it necessary that the defendant occupy the same position with respect to all five persons; he may act as supervisor to some and organizer to others. *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. Unit B 1981). Substantial income or resources derived from the enterprise may be proved circumstantially, *Phillips*, 664 F.2d at 1035, such as by proof of the exchange of thousands of dollars for drugs, *Bolts*, 558 F.2d at 321; evidence that large quantities of drugs moved into and out of the defendant's possession, *Phillips*, 664 F.2d at 1035; evidence of large expenditures in the absence of legitimate income sources, *United States v. Chagra*, 669 F.2d 241, 257 (5th Cir. 1982); and possession of large quantities of drugs having substantial value, *Chagra*, 669 F.2d at 257.

Because Flores attacks the CCE verdict primarily on grounds that the proof on the alleged conspiracy fails, we focus on that underlying offense. To prove a conspiracy to possess with intent to distribute cocaine, the government is required to prove beyond a reasonable doubt that a conspiracy or agreement existed; that the object of the

conspiracy was to unlawfully possess with the intent to distribute cocaine; and that the defendant knew of the conspiracy and intentionally and voluntarily joined and participated in the conspiracy. *United States v. Gardea Carrasco*, 830 F.2d 41, 44 (5th Cir. 1987). A conspiracy may be proved by circumstantial evidence, *United States v. Williams-Hendricks*, 805 F.2d 496, 502 (5th Cir. 1986), including concert of action, *United States v. Natel*, 812 F.2d 937, 940-41 (5th Cir. 1987), and may be based upon presence and association, together with other evidence. *United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987).

Flores first asserts that the 1984 and 1985 cocaine transactions were not related to the subsequent offenses occurring from 1988 to 1990, nor did they occur while he was acting as an organizer or manager to at least five other people. Thus, he posits, these early transactions cannot constitute the predicate offenses necessary to establish a CCE. The government urges us to allow the CCE conviction to stand based upon proof of the 1984 and 1985 drug offenses alone. Its argument is that the finding of a single conspiracy extending from 1984 through 1990 allows it to aggregate the number of people involved in the entire conspiracy and attribute that number of individuals to the early substantive offenses to satisfy the five-person requirement. We do not decide whether such evidence would be sufficient to sustain a CCE conviction, because we find that the government adequately proved three discrete predicate drug offenses: the conspiracy offense, the possession with intent to distribute offense, and the misuse of a communication facility offense.

Flores claims that the conspiracy count cannot constitute a predicate offense for several reasons. First, Flores argues that if the 1984 and 1985 early transactions were part of a separate conspiracy, or were not part of the conspiracy encompassing the later transactions, then the evidence would fail to establish the conspiracy as charged. He essentially asserts that the government proved two separate conspiracies, one spanning the years 1984 and 1985, and another from 1987 to 1990; thus, the conspiracy as alleged in the indictment was not proved and is therefore insufficient to serve as a CCE predicate offense. The argument is meritless. The question for us is whether a drug conspiracy was proved that will support the CCE verdict. Even if the government proved two separate conspiracies rather than one overarching conspiracy as alleged in the indictment, we have long held that we will not reverse a conviction for a variance of this nature unless the defendant establishes that (1) the evidence the government offered at trial varied from what the government alleged in the indictment, and (2) that variance prejudiced the defendant's substantial rights. *United States v. Richerson*, 833 F.2d 1147, 1152 (5th Cir. 1987).

It is thus unimportant – certainly for our purposes today – to determine whether one or two conspiracies existed or were proved; at the very least, the government established that a drug conspiracy existed between 1987 and 1990 that satisfied all the prerequisites of a CCE predicate offense, and the evidence of which was not at variance with the conspiracy alleged in the indictment. By 1988, when Flores began selling kilograms to Peter Seaverns, he was using others to conduct negotiations

and make deliveries for him. By 1989, Joseph Peake, Luis Garcia, Seaverns, Albert Dodd, and Jesus Moncada all worked for Flores in some capacity to deliver and sell drugs, transport money, and/or buy and sell transport vehicles. In 1989, Antonio Ayala came on board. By 1990, Flores had enlisted Francisco Obregon-Sosa, apparently as an intermediary with Colombian cocaine sources. In short, this predicate offense clearly occurred while Flores was acting as an organizer or manager of five or more other people as is required by the CCE statute. Thus, this conspiracy, whether viewed as disparate and separate or simply as part of a [sic] overarching conspiracy, clearly qualifies as a predicate offense under the CCE statute. Furthermore, even if the conspiracy established at trial varied from the one alleged by the government in its indictment, it is settled law that when the "government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." *Richerson*, 833 F.2d at 1155 (citing *United States v. L'Hoste*, 609 F.2d 796, 801 (5th Cir. 1980)). Flores did not establish either of the prongs of the *Richerson* test as is required for a reversal based on this type of variance in the evidence.

Flores next argues that the conspiracy count cannot serve as a predicate offense because the evidence does not establish that at all times during the conspiracy five other people were involved. This argument is meritless. The evidence clearly supports that at all times five or more people were involved in the conspiracy that spanned the years 1987 through 1990.

Flores further argues that even if proof of the conspiracy is sufficient, reversal of his conviction is still

required because "it is not clear which three predicate offenses the jury considered in determining appellant's guilt of the CCE." (Appellant's Brief at 16.) The issue raised by Flores is essentially whether the district court was required to instruct the jury members that they must unanimously agree on the three or more continuing offenses required to convict him on the CCE count.[6] We need not resolve this issue on the record before us. Flores did not raise the issue of unanimity before the trial court and requested no instruction on the issue. The failure to give an unrequested instruction is reviewed for plain error, *United States v. Rocha*, 916 F.2d 219, 241 n.27 (5th

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[6] The Third and Seventh circuits have addressed this issue and have reached opposite conclusions. In *United States v. Echeverri*, 854 F.2d 638 (3rd Cir. 1988), the Third Circuit reversed the defendant's CCE conviction when the evidence showed more than three violations and the district court refused the defendant's request for an instruction requiring the jury to agree unanimously on the three acts comprising the continuing series of violations. The court reasoned that this additional instruction was required to ensure that the jurors reached a unanimous verdict on all elements of the offense. *Echeverri*, 854 F.2d at 643.

The Seventh Circuit reached the opposite conclusion in *United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1940 (1992). The *Canino* court held that constitutional requirements for juror unanimity were met when each juror is convinced beyond a reasonable doubt that the defendant committed the requisite predicate offenses. The court reasoned that because the CCE offense was directed at continuing drug enterprises, no more is required than the jury's agreement that the enterprise was in fact a continuing one. *Canino*, 949 F.2d at 947-48. For the same reason that juror unanimity is not required for the identity of the five or more persons supervised or organized by the defendant, it is not required for the predicate offenses. *Id.*

Cir. 1990), which is defined as "error so fundamental as to result in a miscarriage of justice." *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 901 (5th Cir. 1970). The jury unquestionably found Flores guilty of the possession with intent to distribute offense and the use of a communication facility to commit a drug felony offense. Most of the same evidence was relevant to, and supported, the conspiracy count. Given the further evidence of the conspiracy that was presented to the jury members at trial, we are convinced that no injustice has been visited upon Flores. We therefore need to say nothing further on this point. The jury verdict on the CCE count stands.

B

Flores argues that with respect to the money laundering counts, the government was required to establish beyond a reasonable doubt that the funds used to purchase the Suburbans were the proceeds of unlawful activity. Because the evidence established that Flores had a legitimate source of income at the time of the purchases, and the government did not irrefutably prove that the Suburbans were not purchased with funds derived from this legitimate income source, he contends that the evidence was insufficient to prove his guilt. It is not necessary, however, that the government prove this element through direct evidence; "evidence of a differential between legitimate income and cash outflow is sufficient for a money-laundering conviction, even when the defendant claims income from additional sources." *United States v. Webster*, 960 F.2d 1301, 1308 (5th Cir. 1992). The evidence presented in this case conforms to that standard.

To prove a money laundering violation under 18 U.S.C. § 1956(a)(1), the government must show that the defendant (1) conducted or attempted to conduct a financial transaction, (2) that the defendant knew involved [sic] the proceeds of a specified unlawful activity, (3) with the intent to promote or further unlawful activity. *United States v. Ramirez*, 954 F.2d 1035, 1039 (5th Cir. 1992). Drug trafficking and CCE are specified unlawful activities. 18 U.S.C. § 1956 (c)(7)(B),(C).

In *Webster*, the defendant was convicted of money laundering in connection with a drug conspiracy. On appeal, he argued that the evidence was insufficient to convict him on this charge because defense witnesses testified that they saw Webster gambling and winning "substantial sums of money in the thousands of dollars;" the government did not conclusively prove that he did not use this "extraneous source" money to make the purchases in question. The court dismissed Webster's argument, noting that at trial the government had presented evidence of drug sales in which Webster was allegedly involved along with evidence of Webster's legitimate income, which it contended was insufficient to support the amount of cash payments made. It held that such evidence was indeed sufficient to support a money laundering conviction. Similarly, proof of a defendant's knowledge that proceeds are from an unlawful activity may be inferred from possession of a large quantity of unexplained currency. *United States v. Salazar*, 958 F.2d 1285, 1296 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 185 (1992).

The evidence established that on March 1, 1990, Flores purchased two Suburbans from Seaverns at Dove

Motor Company for $46,000, and that approximately two weeks later, he purchased another Suburban from Seaverns for $20,000. The three Suburbans were paid for in cash, and the titles to the vehicles were not placed in Flores's name. These three transactions formed the basis of the money laundering charges in the indictment.

Sufficient circumstantial evidence proved the origin or nature of the funds used to purchase the vehicles. Flores trafficked in substantial quantities of controlled substances for a lengthy period of time, conducted numerous cash transactions, including those involved in the money laundering counts, using nominees or false names, and had access to substantial quantities of currency. Despite his ownership of a purportedly legitimate business and possession of bank accounts, he conducted large transactions in cash. Despite efforts to show that he ran legitimate businesses, his records and those of his businesses for 1990 show that he spent $220,000 more than the businesses collected in the first five and one-half months of the year, not including payments for numerous charter airplane flights and the vehicle purchases at issue. From this evidence, a jury could find that the $60,000 in currency used to purchase the three Suburbans placed in the names of nominees or in false names was derived from illegal activity, and that Flores knew this to be the case. The jury verdict will be affirmed.

C

Flores argues that the district court erred when it considered the seizure of 1200 kilograms of cocaine in the Villa Abumada incident in calculating his base offense

level, because the government did not establish by a preponderance of the evidence that he was connected to the drugs involved in that seizure. He also argues that a "drug ledger" seized at Vista Remodeling was not sufficiently connected to him to permit the district court to consider for sentencing purposes the 256 kilograms of cocaine described therein. Under the relevant sentencing guideline, the addition of these 1,456 kilograms raised his base offense level from 40 to 46, resulting in a mandatory life sentence.

Flores challenges specific factual findings by the district court relating to the quantity of drugs involved in his offenses; thus, we review for clear error. 18 U.S.C. § 3742(d); *Pierce*, 893 F.2d at 678. The government must prove sentencing facts by a preponderance of the evidence, subject to required indicia of reliability. *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 106 S.Ct. 2411, 2418-19 (1986); *United States v. Alfaro*, 919 F.2d 962 (5th Cir. 1990). In determining drug quantities, the district court may consider any evidence that has "sufficient indicia of reliability." *United States v. Sherrod*, 964 F.2d 1501, 1508 (5th Cir. 1992) (citing U.S.S.G. § 6A1.3, comment, and *United States v. Manthei*, 913 F.2d 1130, 1138 (5th Cir. 1990)). These may be established by the presentence report and the court may make findings based on information contained in the presentence report. *United States v. Burch*, 873 F.2d 765, 767 (5th Cir. 1989) [A] presentence report generally bears sufficient indicia of reliability to be considered as evidence in making factual determinations required by the sentencing guidelines." *Alfaro*, 919 F.2d at 966; *United States v. Murillo*, 902 F.2d 1169, 1173 (5th Cir. 1990). Where a defendant presents no relevant affidavits

or evidence to rebut the information in the presentence report, the court is free to adopt the findings of the presentence report without further inquiry or explanation. *United States v. Mir*, 919 F.2d 940, 943 (5th Cir. 1990); *United States v. Rodriguez*, 897 F.2d 1324, 1327-28 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 158 (1990). Credibility questions raised by the sentencing information are committed to the district court's discretion. *Alfaro*, 919 F.2d at 955 (citing U.S.S.G. § 6A1.3).

Evidence establishing Flores's responsibility for the 1200 kilograms of cocaine seized at Villa Ahumada included the following: in March 1990, Flores acquired three late-model Suburbans, paid for in cash, placed in the names of others, and which Flores said were headed for Mexico. He was accompanied by Bermudez, who then purchased and installed radio equipment in two of them. In May, Flores had several conversations about locating an appropriate landing strip, well paved but not too far away. In another conversation on May 23, he made arrangements with Bermudez to meet a pilot. On June 7, when planes hauling the 1200 kilograms of cocaine were intercepted in Villa Ahumada, Mexico, at least one of Flores's Suburbans was present, as was his co-conspirator and brother-in-law Jesus Moncada. In subsequent telephone conversations, Flores discussed the Villa Ahumada seizure and arrests; according to the presentence report, he also told Seaverns of the seizure. On June 9, 10, and 12, Flores and Bermudez chartered three flights from El Paso to Miami; according to Peake, the flights transported Colombian pilots to Florida.

Flores offered the testimony of Ivan Enriquez, a private investigator hired by Flores, in rebuttal. Enriquez

stated that he had interviewed Ismael Navarrete and Juan Carlos Lozoya and that both individuals had denied their involvement in the purchase of the three Suburbans from Seaverns at Dove Motor Company. This testimony directly contradicted that of Seaverns. Enriquez further testified that he had interviewed Hugo Adrian De La Rosa, and that De La Rosa told him that the statement that De La Rosa had given to Mexican police implicating Flores in the Villa Ahumada affair was elicited only after De La Rosa had been tortured by them. De La Rosa subsequently retracted his statement. Enriquez then testified that he had interviewed Francisco Obregon-Sosa at a Mexican prison and that Obregon-Sosa also denied delivering $40,000 to Seaverns for the purchase of the Suburbans. Flores also offered a portion of a Mexican judicial proceeding dismissing charges against Moncada and others in the incident, and finding the evidence insufficient to charge Flores with the affair.

Thus, the district court was presented with a choice between the conflicting evidence presented by the government and Flores. This choice was committed to its discretion. Considering the various sources of information linking Flores to the Villa Ahumada affair, the trial court could reasonably decline to credit the contradicting evidence presented by Flores. In short, the district court's finding is supported by the record and cannot be said to be clearly erroneous.

The "drug ledger" seized at Vista Remodeling was also sufficiently connected to Flores to permit the district court to consider the 256 kilograms of cocaine described therein for sentencing purposes. In addition to figures and notations on the document, including names of co-

conspirators and words denoting kilograms ("llaves"), other evidence corroborated Flores's involvement in that quantity of cocaine: the document reflected a transaction in California, he lost $1.4 million to the seizure in California, and he was otherwise involved in trafficking large quantities of cocaine. The information had "insufficient indicia of reliability" to support the district court's finding; Flores's sentence was correctly calculated. The sentence will be affirmed.

IV

The evidence proved that Flores committed three or more felony drug offenses as part of a continuing series of violations; this evidence was sufficient to sustain his conviction for conducting a continuing criminal enterprise. Additionally, sufficient circumstantial evidence proved that cash used by Flores in March 1990 to buy three Suburbans was the proceeds of unlawful activity. Finally, the district court's decision to include 1200 kilograms of cocaine seized in Villa Ahumada and 256 kilograms of cocaine referenced on a drug ledger seized at Vista Remodeling in calculating the relevant drug quantity for sentencing was not clearly erroneous. Flores's convictions and sentence are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8676

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS ARMANDO FLORES,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING
(March 4, 1993)

Before WISDOM, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.